

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

RECEIVED

OCT - 4 1994

FEDERAL COMMUNICATIONS COMMISSION  
DOCKET FILE COPY

Statement of the	)	
	)	
Public Utilities Commission of	)	PR Docket No. 94-109
Ohio's Intention to Preserve Its	)	
Right for Future Rate and Market	)	
Entry Regulation of Commercial	)	
Mobile Radio Services	)	

**REPLY COMMENTS OF SPRINT CELLULAR COMPANY**

Pursuant to the Public Notice<sup>1</sup> of the Federal Communications Commission ("FCC" or "Commission"), Sprint Cellular Company ("Sprint") files its Reply Comments in the captioned proceeding.

In this proceeding, the Public Utilities Commission of Ohio ("PUCO") seeks to ensure that it will not be preempted under the Communications Act of 1934, as amended, (the "Act" or "Communications Act") in its "current limited state regulation over rates and market entry,"<sup>2</sup> and that

---

1 Public Notice, State Petitions to Retain Authority Over Intrastate Mobile Service Rates, DA 94-876, 59 Fed. Reg. 42,595 (1994).

2 Statement of the Public Utilities Commission of Ohio's Intention to Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services ("Statement") at 2.

"federal law does not prevent"<sup>3</sup> it from asserting, in the future, jurisdiction over matters relating to rate and market entry of commercial mobile radio service ("CMRS") providers.<sup>4</sup> Section 332(c)(3)(B) of the Act,<sup>5</sup> requires that any state desiring to continue existing rate and entry regulation over CMRS providers must petition the FCC by August 10, 1994, for such authority. Sixteen parties filed comments on September 16, 1994, in response to PUCO's Statement, virtually all urging its dismissal or denial.

**I. COMMENTERS AGREED THAT PUCO HAS FAILED TO  
MAKE THE REQUISITE STATUTORY SHOWING TO  
CONTINUE RATE REGULATION OF CMRS  
PROVIDERS**

Commenters agreed that PUCO failed to make the evidentiary showing required by Section 332 of the Act to continue rate regulation of CMRS providers. Under Section 332 of the Act, PUCO was required to demonstrate that (i) market conditions in commercial mobile services fail to protect consumers adequately from unjust and unreasonable rates or rates that are unjustly and unreasonably discriminatory, or (ii) such market conditions exist and commercial mobile radio service ("CMRS") is a substitute for land line telephone exchange service for a substantial

---

3 Id.

4 Id.

5 47 U.S.C.A. § 332(c)(3)(B) (West Supp. 1994).

portion of the telephone land line exchange service within Ohio.<sup>6</sup>

In implementing this section of the Communications Act, the FCC required that state petitions rely on state-specific evidence.<sup>7</sup> As a number of commenters correctly noted, Commission rules require that a petition include "[d]emonstrative evidence that market conditions in the state for [CMRS] do not adequately protect subscribers."<sup>8</sup> The Commission's rules further specify the types of state-specific evidence that would satisfy PUCO's burden of proof under the Communications Act.<sup>9</sup>

Commenters agreed that PUCO bore a very high burden of proof,<sup>10</sup> but that it utterly failed to present any pertinent evidence to support any continued rate regulation of CMRS providers, and therefore, failed to meet its

---

6 47 U.S.C.A. § 332(c)(3)(A)(i)-(ii) and (B) (West Supp. 1994).

7 Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1521 (to be codified at 47 C.F.R. § 20.13(a)(1)) (1994) ("Second Report and Order") (emphasis added).

8 See e.g., Opposition of McCaw Cellular Communications, Inc. ("McCaw") at 9.

9 Second Report and Order at 1521-22 (to be codified at 47 C.F.R. § 20.13(a)(2)).

10 Comments of GTE Mobilenet Inc. ("GTE") at 9-11; Comments of Mobile Telecommunications Technologies Corp. ("Mtel") at 2-3, 5; and Comments of Paging Network, Inc. at 2.

statutory burden.<sup>11</sup> By contrast, no commenter alleged that PUCO had presented pertinent evidence or carried its burden of proof.

Nextel Communications, Inc. ("Nextel"), which filed general Comments in response to all state petitions submitted on or before August 10, 1994, also does not argue that Ohio made the requisite showing to justify the extension of rate and entry regulation for any CMRS providers. Nextel does attempt, however, to argue that the Commission should distinguish between dominant and non-dominant CMRS providers in analyzing the merits of each state petition.<sup>12</sup> Nextel's argument, as applied to the PUCO Statement, misses the point. The Commission's first line of inquiry must be to determine if the petitioning state met its very high standard of proof to justify the extension of rate or entry regulation to any CMRS provider. Since PUCO failed to submit any justification for such continued regulation, the Commission's inquiry must go no further.

Commenters similarly agreed with Sprint that PUCO's attempt to continue what it termed "limited" rate and entry regulation through its complaint process and review of

---

11 Opposition of New Par at 1-2; Comments of GTE at 11; Comments of Mtel at 5-6; Opposition of McCaw at 10; Comments of Ray's Electronics, Inc. at 6; Comments of Ameritech Mobile Communications, Inc. at 1; and Opposition of the Cellular Telecommunications Industry Association at 2-3.

12 Comments of Nextel at 8.

roaming agreements must be denied.<sup>13</sup> For example, GTE noted that when PUCO adjudicates complaints regarding rates, it engages in the regulation of rates just as though it were reviewing tariffs.<sup>14</sup> Similarly, commenters agreed with Sprint by stating that any contract review, which encompasses oversight of rates, also constitutes rate regulation.<sup>15</sup>

Since PUCO failed to meet its burden to justify any extension of PUCO rate regulation, limited or otherwise, all such rate and entry regulation of CMRS providers has been preempted under the Act.

## **II. NATIONAL CELLULAR RESELLERS ASSOCIATION'S COMMENTS DO NOT SUPPORT CONTINUED RATE REGULATION OF OHIO CMRS PROVIDERS**

The National Cellular Resellers Association's ("Resellers") Comments do not advance PUCO's Statement. Section 332 of the Communications Act places the burden of proof on the state for continued rate regulation of CMRS providers. PUCO's failure to meet its statutory burden cannot be rescued by the Resellers' efforts to demonstrate that cellular market conditions generally are not fully competitive.<sup>16</sup> The Commission's own actions in refusing to

---

13 Comments of GTE at 15-16; Comments of New Par at 4-5; and Opposition of McCaw at 8.

14 Comments of GTE at 15.

15 Opposition of New Par at 4-5 and Comments of GTE at 14.

16 See Comments of Resellers at 3.

impose tariff requirements on cellular carriers demonstrate that a finding that a market is not completely competitive does not necessarily require the imposition of rate regulation.<sup>17</sup>

A state cannot meet the heavy burden imposed under Section 332 merely by showing that its market is not completely competitive. Rather, it must demonstrate that market conditions failed to protect adequately CMRS subscribers from unjust or unreasonable rates.<sup>18</sup> At no point, do the Resellers' Comments address the specific market conditions that exist in Ohio. Yet, the only purpose of this proceeding is to present the Commission with state-specific evidence of market conditions for CMRS providers and their customers.<sup>19</sup> Therefore, the Commission should give no weight to the Resellers' Comments in assessing the PUCO Statement.

### **CONCLUSION**

Disposition of the PUCO Statement is very simple. PUCO was required under the Communications Act to present evidence regarding Ohio CMRS market conditions. Because PUCO failed to do so, the Statement must be dismissed. Rate and entry regulation for Ohio CMRS providers has been

---

17 Second Report and Order at 1467-68.


18 47 U.S.C.A. § 332(c) (West Supp. 1994).

19 Second Report and Order at 1504-05.

preempted, including PUCO complaint adjudication or contract review affecting CMRS rates or entry. Comments attempting to distinguish between types of CMRS carriers are irrelevant to disposition of the Statement because PUCO did not present a substantive case supporting continued rate regulation of any CMRS providers. Similarly, comments citing to general conclusions that the cellular market is not completely competitive do not meet the burden of proof of Section 332 of the Act requiring submission of state-specific evidence of harm to consumers.

Respectfully submitted,  
SPRINT CELLULAR COMPANY

By

  
Jay C. Keithley  
1850 M Street, N.W.  
Suite 1100  
Washington, DC 20036  
(202) 857-1030

Kevin C. Gallagher  
8725 W. Higgins Road  
Chicago, IL 60631  
(312) 399-2348

Its Attorneys

October 4, 1994

## CERTIFICATE OF SERVICE

I, Melinda L. Mills, hereby certify that I have on this 4th day of October, 1994, sent via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing "Reply Comments of Sprint Cellular" in the Matter of Public Utilities Commission of Ohio's Intention to Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Radio Service, PR Docket No. 94-109 filed this date with the Acting Secretary, Federal Communications Commission, to the persons on the attached service list.

  
Melinda L. Mills



Mark J. Golden  
Acting President  
Personal Communications Industry Assoc.  
1019 19th Street, NW  
Suite 1100  
Washington, DC 20036

Richard S. Becker  
James S. Finerfrock  
Becker & Madison, Chartered  
1915 Eye Street, NW, 8th Floor  
Washington, DC 20006  
Counsel for Ray's Electronics, Inc.

Leonard J. Kennedy  
Laura H. Phillips  
Richard S. Denning  
Dow, Lohnes & Albertson  
1255 23rd Street, NW  
Washington, DC 20037  
Counsel for Nextel Communications

Thomas J. Casey  
Jay L. Birnbaum  
Richard A. Hindman  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue, NW  
Washington, DC 20005-2111  
Counsel for New Par

Joel H. Levy  
William B. Wilhelm, Jr.  
COHN and MARKS  
1333 New Hampshire Avenue, NW  
Suite 600  
Washington, DC 20036  
Counsel for National Cellular Resellers  
Association

Thomas Gutierrez  
J. Justin McClure  
Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, NW  
Suite 1200  
Washington, DC 20036  
Counsel for Mobile Telecommunication  
Technologies Corp.

Scott K. Morris  
Vice President - External Affairs  
McCaw Cellular Communications, Inc.  
5400 Carillon Point  
Kirkland, WA 98033

Howard J. Symons  
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo  
701 Pennsylvania Avenue, NW  
Suite 900  
Washington, DC 20004  
Counsel for McCaw Cellular

Donald J. Evans  
McFadden, Evans & Sill  
1627 Eye Street, NW  
Suite 810  
Washington, DC 20006  
Counsel for GTE Mobilenet, Inc.

Michael F. Altschul  
Randall S. Coleman  
Andrea D. Williams  
Cellular Telecommunications Industry Assoc.  
1250 Connecticut Avenue, NW  
Suite 200  
Washington, DC 20036

John C. Gockley  
Frank M. Panek  
AMERITECH  
2000 W. Ameritech Center Drive  
Room 4H84  
Hoffman Estates, IL 60196

Russel H. Fox  
Susan H.R. Jones  
Gardner, Carton & Douglas  
1301 K Street, NW  
Suite 900, East Tower  
Washington, DC 20005  
Counsel for E.F. Johnson Co.

Elizabeth R. Sachs  
Lukas, McGowan, Nace & Guterierrez  
1111 19th Street, NW  
Suite 1200  
Washington, DC 20036  
Counsel for Am. Mobile Telecommunicatins  
Assoc., Inc.

Alan R. Shark, President  
American Mobile Telecommunications Assoc.  
1150 18th Street, NW  
Suite 250  
Washington, DC 20036

Judith St. Ledger-Roty  
James J. Freedman  
Reed, Smith, Shaw & McClay  
1200 18th Street, NW  
Washington, DC 20036  
Counsel for Paging Network, Inc.

Martin D. Liebman\*  
Private Radio Bureau  
Federal Communications Commission  
2025 M Street, NW, Room 5202  
Washington, DC 20554

Ralph A. Haller\*  
Chief, Private Radio Bureau  
Federal Communications Commission  
2025 M Street, NW, Room 5002  
Washington, DC 20554

Jay Jackson\*  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 644  
Washington, DC 20554

Kathleen Wallman\*  
Chief, Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 500  
Washington, DC 20554

Nancy Boocker\*  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 644  
Washington, DC 20554

John Cimko, Jr. \*  
Chief, Mobile Services Div.  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 644  
Washington, DC 20554

Gerald P. Vaughan\*  
Deputy Chief  
Private Radio Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 500  
Washington, DC 20554

Kathleen O'Brien Ham\*  
Private Radio Bureau  
Federal Communications Commission  
2025 M Street, NW, Room 5202  
Washington, DC 20554

David Furth\*  
Acting Chief, Rules Branch  
Private Radio Bureau  
Federal Communications Commission  
2025 M Street, NW, Room 5202  
Washington, DC 20554

Julia Kogan\*  
Private Radio Bureau  
Federal Communications Commission  
2025 M Street, NW, Room 5202  
Washington, DC 20554

Lee Fisher  
Attorney General of Ohio  
Public Utilities Section  
180 East Broad Street  
Columbus, OH 43215-3793

Greg Vogt, Chief\*  
Tariff Division  
Federal Communications Commission  
1919 M Street, NW, Room 518  
Washington, DC 20554

ITS\*  
1919 M Street, NW, Room 246  
Washington, DC 20554

Joel Ader\*  
Bellcore  
2101 L Street, NW, 6th Floor  
Washington, DC 20037

\* Indicates Hand Delivery